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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 921

PACIFIC STEAMSHIP LINES LTD.
(a corporation),
Petitioner,

vs.

ROY W. CROSBY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals,
Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT.

May it please the Court:

Pacific Steamship Lines, Ltd., a debtor corporation under Section 77-B of the Bankruptcy Act, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause, numbered therein No. 10,155.

OPINION BELOW.

The opinion of the Court below (R. 678) is reported in 133 F. (2d) Adv. 470. There was no opinion in the District Court (Northern District of California).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 25, 1943 (R. 692). A petition for rehearing was seasonably made and entertained and denied (R. 693).

The jurisdiction of this Court in invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. § 347).

STATEMENT.

Petitioner is a debtor corporation in possession of its property under Section 77-B of the Bankruptcy Act, although the record contains neither a petition nor an order disclosing that fact (CCA Opinion, R. 678).

The respondent is a ship broker who, on January 17, 1941, filed a petition in the bankruptcy proceedings claiming a brokerage fee of $62,500.00 in connection with the sale of the Steamships H. F. Alexander and Emma Alexander, to the British Ministry of Shipping (now, and in the proceedings referred to as the British Ministry of War Transport). The matter was referred and re-referred to a Special Master for hearing. The

issue raised was whether the respondent broker procured the British Ministry of War Transport as a purchaser, or whether the petitioner made the sale direct, without the aid of any broker (CCA Opinion, R. 678).

At the hearing before the Special Master, John J. Walsh, called by the petitioner, testified that he was the British Ministry of War Transport on the Pacific Coast, an arm of the British Government (Master's Certificate, R. 49), and that he purchased the vessels directly from the petitioner for the British Ministry of War Transport; that he did not know the respondent nor his associates, and had no dealings with them (R. 520-522). On cross-examination he admitted he had correspondence with the New York British Ministry of War Transport in connection with the purchase of said vessels; that such correspondence dealt with other vessels (R. 532) and refused to produce such correspondence on the ground that the correspondence belonged to the British Government, that under his instructions it was confidential and not to be disclosed to anyone outside of the British Government (R. 529). The Special Master refused to order the production of the correspondence and the respondent moved to strike the testimony of the witness on the ground that the witness refused to submit to cross-examination, which motion was denied (R. 530). The Special Master, in his certificate and report, recommended the dismissal of the petition, which was approved by the order of the District Court (R. 28), from which order, the appeal was taken (R. 88).

The Circuit Court of Appeals for the Ninth Circuit reversed the District Court, and in its opinion stated (R. 678, 691):

> "The parties assume that appellee is under the jurisdiction of the court below in a proceeding under § 77B of the Bankruptcy Act. The record before us contains neither a petition nor an order disclosing that fact, but we treat the assumption of the parties as a concession of the fact." (R. 678.)
>
> "* * * All we can hold here is that it was error to refuse to compel Walsh to produce the correspondence for the inspection of the special master to determine their admissibility in evidence, because of an absence of showing: (1) existence of a rule of the British Ministry of Shipping that all correspondence between its officers is confidential; (2) existence of a direction, by an officer superior to Walsh, to Walsh that the correspondence is confidential; (3) existence of a direction to Walsh by an officer superior to Walsh, authorizing the latter to determine what correspondence is confidential; and (4) how the correspondence would in any manner jeopardize the public interest, safety or security." (R. 691.)

QUESTIONS PRESENTED.

The questions presented are:

1. Whether the head of the British Ministry of War Transport on the Pacific Coast is competent to determine that correspondence between the British Ministry of War Transport on the Pacific Coast and

the British Ministry of War Transport on the Atlantic Coast of the United States, relative to purchase of vessels in time of war, contains secrets of state and are privileged communications.

2. Whether the head of the British Ministry of War Transport on the Pacific Coast is a public officer within the meaning of Section 1881 (5) of the California Code of Civil Procedure, and the correspondence between the British Ministry of War Transport on the Pacific and Atlantic Coasts was officially confidential within the meaning of that statute.

3. Has the Circuit Court of Appeals for the Ninth Circuit, jurisdiction to reverse the order of the District Court in a bankruptcy action, where in its own opinion, it appears that the record on appeal contains neither a petition nor an order disclosing that the proceeding is under the Bankruptcy Act.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below deals with a question of international law of great public importance in this time of war with respect to the privilege of communications containing secrets of state, in connection with the purchase and movement of vessels by an ally of the United States, the disclosure of which might aid and assist the enemy.

2. The decision of the Court below conflicts, in principle, with the decision of this Court in the early case of *Totten v. United States* (1875), 92 U. S. 105,

23 L. Ed. 605, wherein the principle is laid down that a suit cannot be maintained against the government in the Court of Claims upon a contract for secret services during the Civil War for the reason that it would be necessary to expose the details of dealings with individuals and officers with serious detriment to the public.

3. The decision of the Court below conflicts with the English case of *Beatson v. Skene* (1860), 5 Hurlst. & N. 838, 157 English Rep. (Reprint) 1415, 9 A.L.R. 1103 (note), in which it was held that the question whether the production of the documents would be injurious to the public service, must be determined not by the judge, but by the head of the department having the custody of the paper.

4. The decision fails to properly apply the provisions of the law of the State of California, set forth in *California Code of Civil Procedure,* Section 1881 (5), which provides that "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

5. The decision of the Court below is in conflict with Rule 227 of the *Model Code of Evidence,* presented by the American Law Institute, which grants to the witness the privilege to refuse to disclose a matter on the ground it is a secret of state unless the judge finds otherwise, or the head of the department consents to its disclosure.

6. The decision of the Court below, in assuming jurisdiction, is in direct conflict with the decision of

this Court in *Clune v. United States,* 159 U. S. 590, 593, 40 L. Ed. 269, and in *Redfield v. Parks,* 130 U. S. 623, 624, 625, 32 L. Ed. 1053, and is contrary to its own prior decision in *Hutson v. Coffman* (CCA 9), 100 F. (2d) 640, 641.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted to review those portions of the judgment of the Court below embraced within the questions presented supra.

Dated, San Francisco, California,
April 12, 1943.

KEITH R. FERGUSON,
Attorney for Petitioner.